Tai Kwong Goldsmiths & Jewellers (under receivership) v Yap Kooi Hee & Ors

SUPREME COURT — CIVIL APPEAL NO 02-205-93
MOHAMED AZMI, MOHAMED DZAIDDIN SCJJ AND VC GEORGE J
21 OCTOBER 1994

Partnership *— Receivership — Receiver appointed by court — Garnishee orders obtained by creditors — Whether action could be taken against receiver without leave of court — Whether garnishee orders bad — Whether contempt of court — Whether the fact that O 46 r 2(1) of the Rules of the High Court 1980 conspicuously and specifically omitted to include garnishee proceedings means that leave need not be obtained — Rules of the High Court 1980 O 46 r 2(1), O 49*

Partnership *— Receivership — Priority of distribution of partnership assets — Invocation of maxim 'equality is equity' — Payment of debts and liabilities of partnership to persons not partners to be effected pari passu — Partnership Act 1961*

Tai Kwong Goldsmiths & Jewellers ('the partnership') was dissolved and a receiver appointed by the court. After the appointment of the receiver, three depositors of the partnership obtained garnishee orders against the moneys in the hands of the receiver. None of them had obtained the leave of the court to take out the garnishee proceedings. A preliminary point taken was that leave of the court that appointed the receiver had to be obtained before any proceedings could be taken against the receiver, and as such leave had not been obtained by the garnishors, the garnishee orders were bad.

By a summons-in-chambers, the receiver applied to the court for directions on the priority to be given in respect of the payment out of the moneys got in. The depositors who had obtained the garnishee orders had contended that because they had the garnishee orders in hand, they were entitled to be paid forthwith on the basis of priority over all the other unsecured creditors.

The High Court judge held that leave of the court was not necessary to take out proceedings against the receiver as it was only in respect of proceedings against receivers where misconduct was alleged that leave of the court had to be obtained before proceedings were commenced. The judge also ruled that distribution pari passu in respect of unsecured liabilities did not apply in a distribution of partnership assets pursuant to s 46 of the Partnership Act 1961 ('the Act') and that the receivers should pay out the moneys on a first come first paid basis. (See [1993] 3 MLJ 615.)

Held, allowing the receiver's appeal:

(1) A court-appointed receiver is an officer of the court and any interference with him or with property under his control constitutes a contempt of court. Therefore, nobody can bring any action or proceedings against a receiver in his capacity as such, including execution proceedings which include garnishee

proceedings, whether or not misconduct of the receiver is in issue, without leave of the court and if such an action or proceeding is brought without leave, its further prosecution will be restrained.

(2) There are no provision in the Act that specifies any precedence or order of priority in which the debts and liablities of a partnership are to be paid. This is, therefore, a clear case for the invocation of the maxim 'equality is equity' which succinctly expresses the object of both law and equity, that distribution of property and losses should be proportionate to the several claims or to the several liabilities of the person concerned. To establish a preference among the creditors on the basis of first come first paid is to run foul of the maxim. Therefore, payment of the debts and liabilities of the partnership to persons who are not partners therein should be effected pari passu.

Per curiam:

Order 46 of the Rules of the High Court 1980 ('the RHC') deals with writs of execution where leave has to be obtained before the writ may issue. Although O 46 r 2(1) of the RHC conspicuously and specifically omitted to include garnishee proceedings, these proceedings, which no doubt in a sense are a form of execution proceeding, however, come under O 49 of the RHC and have no place in O 46. Accordingly, nothing turns on the omission to include garnishee proceedings in the list of cases set out in O 46 r 2(1).

[Bahasa Malaysia summary

Tai Kwong Goldsmiths & Jewellers ('perkongsian itu') telah dibubarkan dan seorang penerima telah dilantik oleh mahkamah. Selepas pelantikan penerima itu, tiga orang penyimpan perkongsian itu telah memperolehi perintah garnisan terhadap wang di dalam tangan penerima. Tidak seorang pun daripada penyimpan itu telah memperolehi kebenaran mahkamah untuk mengambil prosiding garnisan itu. Suatu perkara permulaan yang telah dihujahkan adalah bahawa kebenaran mahkamah yang telah melantik penerima itu mesti diperolehi sebelum sebarang prosiding boleh diambil terhadap penerima itu, dan oleh kerana kebenaran sedemikian tidak diperolehi oleh penggarnis, perintah garnisan itu adalah cacat.

Melalui suatu saman dalam kamar, penerima itu telah memohon ke mahkamah untuk mendapat arahan mengenai prioriti tentang pembayaran keluar wang yang telah diperolehi. Penyimpan yang telah memperolehi perintah garnisan itu telah berhujah bahawa oleh kerana mereka mempunyai perintah garnisan itu, mereka berhak dibayar dengan serta-merta atas alasan prioriti atas semua pemiutang tidak bercagar yang lain.

Hakim Mahkamah Tinggi itu telah memutuskan bahawa kebenaran mahkamah tidak diperlukan untuk mengambil prosiding terhadap penerima itu kerana kebenaran mahkamah hanya diperlukan

sebelum prosiding dimulakan apabila terdapat prosiding terhadap penerima di mana salah laku dikatakan. Hakim itu juga telah memutuskan bahawa pembahagian pari passu berkaitan dengan liabiliti tidak bercagar tidak terpakai di dalam pembahagian aset perkongsian di bawah s 46 Akta Perkongsian 1961 ('Akta itu') dan bahawa penerima itu sepatutnya membayar keluar wang itu atas dasar siapa dulu dia yang dibayar dulu. (Lihat [1993] 3 MLJ 615.)

Diputuskan, membenarkan rayuan penerima itu:

(1) Seorang penerima yang telah dilantik oleh mahkamah merupakan seorang pegawai mahkamah itu dan sebarang gangguan terhadap beliau atau harta di bawah kawalannya merupakan suatu penghinaan mahkamah. Oleh itu, sesiapa pun tidak boleh membawa sebarang tindakan atau prosiding terhadap seseorang penerima di dalam keupayaannya sebagai seorang penerima, termasuk prosiding pelaksanaan yang melingkungi prosiding garnisan, sama ada atau tidak salah laku penerima menjadi isu, tanpa kebenaran mahkamah dan jika suatu tindakan atau prosiding dibawa tanpa kebenaran, tindakan guaman selanjutnya akan dihalang.

(2) Tidak terdapat peruntukan di dalam Akta itu yang menyatakan sebarang keutamaan atau susunan prioriti di mana hutang dan liabiliti sesebuah perkongsian akan dibayar. Oleh itu, ini merupakan sebuah kes yang jelas di mana kata pepatah 'kesamarataan merupakan ekuiti' akan terpakai. Kata pepatah ini dengan ringkas menyatakan tujuan kedua-dua undang-undang dan ekuiti, bahawa pembahagian harta dan kerugian sepatutnya bersekadar dengan tuntutan dan liabiliti orang yang berkaitan. Dengan mewujudkan suatu keutamaan di antara pemiutang atas dasar siapa dulu dia yang dibayar dulu adalah bertentangan dengan kata pepatah itu. Oleh itu, pembayaran hutang dan liabiliti perkongsian itu kepada orang yang tidak merupakan rakan kongsi di dalam perkongsian itu sepatutnya di jalankan pari passu.

Per curiam:

Aturan 46 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT itu') adalah berkaitan dengan writ pelaksanaan di mana kebenaran perlu diperolehi sebelum writ itu boleh dikeluarkan. Walaupun A 46 k 2(1) KMT itu secara jelas dan khusus tidak termasuk prosiding garnisan, akan tetapi, prosiding sedemikian, yang tidak disangsikan lagi merupakan satu bentuk prosiding pelaksanaan, jatuh di bawah A 49 KMT itu dan bukan A 46. Oleh itu, adalah tidak penting bahawa prosiding garnisan tidak dimasukkan ke dalam senarai kes yang dinyatakan di dalam A 46 r 2(1).]

Cases referred to

Ames v Birkenhead Dock Trustees (1855) 20 Beav 332 (refd)
Cowan's Estate, Rapier v Wright, Re (1880) 14 Ch D 638 (refd)

De Winton v Brecon Corp (No 2) (1860) 28 Beav 200; 54 ER 342 (refd) A
Dixon v Dixon [1904] 1 Ch 161 (refd)
J Kahn & Anor v Alli Mahomed Hali Umer ILR 16 Bom 577 (refd)
Johnson, Re [1887] 20 QBD 68 (refd)
Lane v Sterne (1862) 3 Giff 629; 66 ER 559 (refd)
Maidstone Palace of Varieties Ltd, Re [1909] 2 Ch 283 (refd) B
Midland Express Ltd, Re [1914] 1 Ch 41 (refd)
Petit v Smith [1695] 1 P Wins 7 & 8 (refd)
Potter, ex p Day, Re (1883) 43 LT 912 (refd)
Rudd & Son Ltd, Re [1984] Ch 237; [1984] 3 All ER 225; [1984] 2 WLR 831 (refd) C
Searle v Choat (1884) 25 Ch D 723 (refd)
Searle Hoare & Co, Re [1924] 2 Ch 325 (refd)
Yates v Terry [1902] 1 KB 527 (refd)
Zainal Abidin Putih & Anor v Che Wan Development Sdn Bhd [1992] 2 MLJ 233 (refd) D

Legislation referred to

Partnership Act 1961 ss 46, 47
Rules of High Court 1980 O 46 r 2(1), O 49, O 89

Appeal from: Civil Suit No D2–24(31)–198–1988 (High Court, Kuala Lumpur) E

Cecil Abraham (*SL Lim* with him) (*Riza Leong & Partners*) for the appellant.
KL Wong (*KL Wong & Co*) for the respondent. F

VC George J: We had allowed this appeal on 6 September 1994. We now give our reasons for doing so.

In Originating Summons No D2-31-198-88, the High Court had, on 6 March 1990, declared that the partnership firm known as Tai Kwong Goldsmiths & Jewellers 'do stand dissolved'. The court went on to order that: G

> Dato Rohailan bin Mohamad be and is hereby appointed the receiver of the said firm to get in and realize the assets, accounts and moneys receivable by the firm and determine its liabilities for the purpose of a dissolution of the said business and to do all that is necessary and/or needful to undertake his task under s 46 of the Partnership Act, and make appropriate settlement and distributions there under. H

Section 46(b) of the Partnership Act 1961 provides that on the dissolution of a partnership, its assets should be distributed in the following manner and order: I

(i) in paying the debts and liabilities of the firm to persons who are not partners therein;

(ii) in paying to each partner rateably what is due from the firm to him for advances as distinguished from capital;

A (iii) in paying to each partner rateably what is due from the firm to him in respect of capital; and

(iv) the ultimate residue, if any, shall be divided among the partners in the proportion in which profits are divisible.

Section 47(1) provides that:

B The rules of equity and of common law applicable in partnership shall continue in force, except so far as they are inconsistent with the express provisions of this Act.

The receiver in the instant case, who as has been seen had been appointed by the court, in discharging his duties as receiver, got in a total of just over C RM1m against liabilities owed by the firm of some RM10m which was the aggregate of amounts owed to various persons who had deposited moneys with the firm and amounts owed to other unsecured creditors which included termination benefits payable to the erstwhile employees of the firm pursuant to an order of the Industrial Court.

D Now, sometime after the aforesaid appointment of the receiver, three of the depositors who had judgments against the firm had obtained garnishee orders, in effect, against the moneys in the hands of the receiver. None of them had obtained the leave of the court to take out the garnishee proceedings.

E By a summons-in-chambers dated 12 September 1992, the receiver had applied to the court for directions in respect of priority to be given in respect of the payment out of the moneys got in. Pending the disposal of the application for directions, the receiver had obtained a stay of execution against each of the depositors who had obtained judgments including the three who had obtained the garnishee orders. The trio had thereafter F successfully applied to be heard in the summons for directions as intervenors and had contended that because they had the garnishee orders in hand they were entitled to be paid forthwith on the basis of priority over all the other unsecured creditors.

A preliminary point taken on behalf of the receiver at the summons G for directions was that the receiver, having been appointed by the court and as such was in effect an officer of the court, a condition precedent to taking out any proceedings against him (which includes garnishee proceedings) was the obtaining of the leave of the court that had appointed the receiver and as such leave had not been obtained by the garnishors or H any of them, the garnishee orders were bad. It was also contended on behalf of the receiver that, in any event, all the unsecured creditors, including the three depositors who had obtained the garnishee orders and the said esrtwhile employees entitled to termination benefits, were all entitled to a distribution of the moneys with the receiver (after deduction of the receiver's fees expenses and the costs) on a pari passu basis. I

The record shows that the learned judge's attention was, inter alia, drawn to the judgment of the Supreme Court in *Zainal Abidin Putih & Anor v Che Wan Development Sdn Bhd* [1992] 2 MLJ 233 where certain originating summonses had been, without leave, taken out against receivers

appointed by the court. Gunn Chit Tuan SCJ in reading the judgment of the court said (at p 241): A

> We would start off by pointing out that the appellants were appointed receivers by the court and are therefore first and foremost officers of the court, and to use the words of Viscount Haldane LC in *William H Parsons & Ors v The Sovereign Bank of Canada* [1913] AC 160 'put in to discharge certain duties prescribed by the order appointing him'. ... B
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> ... But the important point in this case was that as the appellants are officers of the court, leave of the court should have been obtained to proceed against them in the second originating summons and the case of *Re Maidstone Palace of Varieties Ltd* [1909] 2 Ch 283 was correctly cited by counsel for the appellants in support of his submission that leave of the court was necessary. C

We pause to note that there had been no allegations of misconduct on the part of the receiver in that case. Gunn Chit Tuan SCJ pointed out at p 242 of the judgment:

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> But our present case was not one in which the appellants, as receivers, had caused unnecessary proceedings or litigious expenses. In the first originating summons, it was the respondent that had brought the action against the Co-operative Central Bank Bhd. In the second originating summons, it was again the respondent that had taken the action against the appellants. Therefore it was not the appellants, as receivers, who had by their misconduct made any unnecessary application to court for the court to exercise its discretion to make an adverse order against them. E

However in the judgment the subject of the instant appeal, the learned judge went on to hold that the leave of the court was not necessary to take out proceedings against the receiver. His view was that *Zainal Abidin Putih & Anor v Che Wan Development Sdn Bhd* was distinguishable and that it is only in respect of proceedings against receivers where misconduct is alleged that leave of the court had to be obtained before the proceedings were commenced. F

The learned judge also ruled that distribution pari passu in respect of unsecured liabilities does not apply in a distribution of partnership assets pursuant to s 46 of the Partnership Act 1961. He appeared to be of the view that the receivers should pay out the moneys on a first come first paid basis. [See [1993] 3 MLJ 615.] G

The appeal before us was in respect of those two rulings. H

It is trite that a court-appointed receiver is an officer of the court and accordingly, any interference with him or with property under his control constitutes a contempt of court. In *Dixon v Dixon* [1904] 1 Ch 161 at p 163, Swinfen Eady J, with reference to a receiver and manager appointed by the court in respect of a partnership dissolved by the court, took the view in respect of interference with the receiver and manager as something calling for the invocation of the broad principle of protection of an officer of the court. He said: I

A The object of the court is to prevent any undue interference with the administration of justice, and when any one, whether a partner in a business, a party to the litigation, or a stranger, interferes with an officer of the court it is essential for the court to protect that officer.

Hubert Picarda in *The Law Relating to Receivers, Managers and Administrators* B (2nd Ed) at p 347 says:

The relative priorities which obtain between a receiver and a debtor's execution creditors are the same for private and court receivers. A judgment creditor who has levied, but not completed, execution at the time of the appointment is usually stopped in his tracks: the receiver has the edge in priority.

C There is, however, in the case of a court-appointed receiver this additional restriction: that as the receiver is an officer of the court, steps taken against him have to observe proper formalities.

He goes on to say relying on a number of judgments of the English courts including *Ames v Birkenhead Dock Trustees* (1855) 20 Beav 332:

D Accordingly a judgment creditor ought not, without the leave of the court, to levy execution on property which is in the hands of the receiver, albeit that his judgment was obtained before the appointment of the receiver.

In *Ames v Birkenhead Dock Trustees*, Lord Romilly said at p 332:

E There is no question but that this court will not permit a receiver appointed by its authority, and who is therefore its officer, to be interfered with or dispossessed of the property he is directed to receive, by anyone, although the order appointing him may be perfectly erroneous; this court requires and insists that application should be made to the court, for permission to take possession of any property of which the receiver either has taken or is F directed to take possession.

The authoritative *Company Receivers and Managers* (2nd Ed) by James O'Donovan refers to a whole string of authorities to conclude at p 7625:

The receiver and manager is shielded from interference by any person who does not obtain the leave of the court. Even the debenture holder or another G receiver should not disturb the appointee's possession without the authority of the court. Equally, a person with a paramount title or a person for whose protection the appointment was made may intervene only with leave.

As does the even more authoritative Kerr on *The Law & Practice of Receivers and Administrators* (17th Ed) where at p 143 is the unqualified H statement:

When the court has appointed a receiver and the receiver is in possession, his possession is the possession of the court, and may not be disturbed without its leave.

If any action is brought against the receiver without leave, its further I prosecution will be restrained — *Searle v Choat* (1884) 25 Ch D 723.

As has been seen, the learned judge in the instant case was not prepared to accept as a general principle that proceedings may not be

instituted against a receiver without the leave of the court. He says ([1993] 3 MLJ 615 at p 624): A

> It is only where the conduct or misconduct of the receiver is being put into question in any court of law by a claimant against the receiver personally or in the manner of his conduct in discharging his duties that leave of the court must be obtained. Leave of the original court appointing the receiver is required because it is only proper that, as the court originally appointing the said receiver, it should be the proper forum to give direction supervise or discipline if necessary and decide on any issue pertaining to the conduct of its own officers. (*Re Maidstone Palace of Varieties Ltd* [1909] 2 Ch 283 and *Re Potter, ex p Day* (1883) 48 LT 912 applied). B

The learned judge took the view that the Supreme Court in *Zainal Abidin Putih v Che Wan Development Sdn Bhd* [1992] 2 MLJ 233 was 'over-simplifying' the relevant law when it said: C

> But the important point in this case was that as the appellants are officers of the court, leave of the court should have been obtained to proceed against them ... and the case of *Re Maidstone Palace of Varieties Ltd* was correctly cited by counsel for the appellants in support of his submission that leave of the court was necessary. D

The leading textbook writers on the subject do not see the principle being applied in the restrictive manner in which the learned judge says it should be applied. Further, our attention was drawn to a number of judgments of superior courts where the principle was applied to situations where the conduct of the receiver was not in issue: E

(1) *Ames v Birkenhead Dock Trustees* (1855) 20 Beav 332;

(2) *De Winton v Brecon Corp (No 2)* (1860) 28 Beav 200; 54 ER 342;

(3) *Lane v Sterne* (1862) 3 Giff 629; 66 ER 559; F

(4) *J Kahn & Anor v Alli Mahomed Hali Umer* ILR 16 Bom 577 at pp 579–580; and

(5) *Zainal Abidin Putih & Anor v Che Wan Development Sdn Bhd.*

It is appropriate that we point out that the principle stems from a general principle of wide application, that interference with persons having duties to perform in a court of justice amounts to contempt of court. Bowen LJ in *Re Johnson* (1887) 20 QBD 68 at p 74 said: G

> The law has armed the High Court of Justice with the power and imposed on it the duty of preventing brevi manu and by summary proceedings any attempt to interfere with the administration of justice. It is on that ground, and not on any exaggerated notion of the dignity of individuals that insults to judges are not allowed. ... The principle is that those who have duties to discharge in a court of justice are protected by the law, and shielded on their way to the discharge of such duties, while discharging them, and on their return therefrom, in order that such persons may safely have resort to courts of justice. H I

And as has been seen, it is trite that receivers appointed by the court come within the category of persons having duties to discharge in a court of justice.

Re Maidstone Palace of Varieties Ltd [1909] 2 Ch 283 and *Re Potter, ex p Day* (1883) 48 LT 912 relied on by the learned judge are nothing more than examples of the application of the general principle and do not in themselves constitute or give rise to a general principle. Neither of those cases even suggests, not to speak of lay down, any rule to the effect that leave of the court to proceed against a receiver need only be obtained where misconduct is alleged.

The other two cases cited by the learned judge, *Yates v Terry* [1902] 1 KB 527 and *Re Cowan's Estate, Rapier v Wright* (1880) 14 Ch D 638 also do not help in that in neither case was the issue of leave raised. In the former case, there is nothing to suggest that the receiver was court appointed.

The learned judge sought to find support for the view he had taken from the fact that O 46 r 2(1) of the Rules of High Court 1980 ('the RHC') sets out the instances in which a writ of execution may not issue without leave and by seeing some significance in that the rule 'conspicuously and specifically omitted to include garnishee proceedings'.

Order 46 deals with writs of execution which are forms of written command in the name of the Chief Justice of the court concerned, to the sheriff of the court. Order 46 r 1 and the forms prescribed in respect thereof in the RHC show that in fact there are only four kinds of writs of execution provided for by the RHC, namely, writs of seizure and sale, of delivery, of possession and of possession under O 89. In certain circumstances, in respect of those writs of execution, O 46 r 2(1) provides for leave to be obtained before the writ may issue. Order 46 r 2(1) does not purport to deal with the many situations in respect of which leave of the court is necessary before proceedings or some step in the proceedings may be commenced but is restricted to circumstances in respect of only writs of execution where leave is required.

Garnishee proceedings, which no doubt in a sense are a form of execution proceeding however, come under O 49 of the RHC and are initiated by an application made ex parte by summons and are not by way of a writ. They have no place in O 46. Accordingly, nothing turns on the omission to include garnishee proceedings in the list of cases set out in O 46 r 2(1).

We would, accordingly and with respect, disagree with the learned judge's suggestion that *Zainal Abidin Putih v Che Wan Development Sdn Bhd* [1992] 2 MLJ 233 does not apply and would reiterate that there is a general principle of wide application that interference with persons having duties to perform in or at the instance of a court of justice amounts to contempt of court. And stemming from that principle, we lay down, in the context of the issues raised in this appeal, that the court will not permit a receiver appointed by its authority and who is therefore its officer, to be interfered with without leave. In elaboration (but without retrogating the effect of the rule) we further lay down that nobody can bring any action or proceedings against a receiver, in his capacity as such, including execution proceedings which include garnishee proceedings, whether the misconduct of the receiver is in issue or not, without the leave of the court and if such

an action or proceeding is brought without leave, its further prosecution will be restrained. A

In our judgment, each of those three garnishee orders having been obtained without leave were improperly obtained and in proceeding to obtain them and in obtaining them, the appellants were in effect in contempt of the court that appointed the receiver. The garnishee orders and each of them are of no effect. If there had been any amounts paid to the garnishors pursuant to the garnishee order such amounts should be forthwith repaid to the receiver. B

We now deal with the learned judge's ruling in respect of the application of the moneys in the hands of the receiver. As has been seen, s 46(b)(i) of the Partnership Act 1961 provides that in a dissolution of a partnership, its assets should be applied firstly in paying the debts and liabilities of the firm to persons who are not partners. It is to be noted that there is no provision in the Act that specifies any precedence or order of priority in which such debts and liablities are to be paid. C

In our judgment, this is a clear case for the invocation of the maxim equality is equity or as Lord Somers LC stated it in *Petit v Smith* [1695] 1 P Wins 7 & 8, 'equity delights in equality'. The maxim succinctly expresses the object of both law and equity, that distribution of property and losses should be proportionate to the several claims or to the several liabilities of the person concerned. D

The maxim was applied by Nourse J in *Re Rudd & Son Ltd* [1984] Ch 237 at p 242; [1984] 3 All ER 225 at p 228; [1984] 2 WLR 831 at p 835 where having pointed out that the creditors of the partnership have priority over the creditors of the companies who were the partners, went on to apply vis-a-vis the creditors of the partnership the maxim: E

> The result, so far as material, is that the creditors of the partnership are, in regard to the partnership assets, to take priority over the creditors of each of the companies. But that is as far as it goes. There is nothing to say that the partnership creditors shall not rank pari passu as between themselves. In other words, if Mr Mummery is to establish a preference for one or more classes of the partnership debts over others he must look elsewhere. F G

In *Re Searle Hoare & Co* [1924] 2 Ch 325 at p 328 is another illustration of the application of the maxim:

> In my judgment, there is nothing in the statement of Jessel MR which warrants the proposition that, where there is a common fund which is being administered for the equal benefit of all the creditors, a creditor who has been paid out of that fund more than was due to him is entitled to receive further moneys out of the fund without first giving credit for the overpayment. H

Re Midland Express Ltd [1914] 1 Ch 41 provides at p 48 yet another illustration of the application by the English courts of the maxim:

> Some debenture-holders have received interest and others not, and there has been inequality in the payment of interest. That happened before the floating security ceased to float or, as the term is, 'crystallized'. Since the crystallization the assets have been or are being realized, and the contention I

A of the appellants is that those debenture-holders who have not received interest on a par with the others must first receive a payment to level them up to what the others have received before there can be any further distribution. That contention is based on the maxim of equity that 'equality is equity', and the appellants have relied upon various cases as illustrations of the way in which that maxim is applied in the administration of equity.

B In our judgment, to establish a preference among the creditors on the basis of first come first paid is to run foul of the maxim. Section 47 of the Partnership Act 1961 preserves the application of the rules of equity and common law in respect of matters pertaining to partnerships and, accordingly and in any event, our courts being courts of equity will grow C on any such iniquitous distribution of the assets.

In the instant case, there not being any specific provision to the contrary, the maxim has to be applied. Payment, (pursuant to s 46(b)(i) of the Partnership Act 1961), of the debts and liabilities of the firm to persons who are not partners therein, should be effected pari passu.

D The appeal had to be and was allowed with costs.

Appeal allowed.

Reported by Prof Ahmad Ibrahim

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